Filed 10/1/03 In re Joshua H. CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

In re JOSHUA H., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. JOSHUA H., Defendant and Appellant.	A098264 (Alameda County Super. Ct. No. J184269)

I. INTRODUCTION

Joshua H. appeals from the order of the Alameda County Superior Court committing him to the California Youth Authority (CYA) following his admission that he committed assault with a deadly weapon and personally inflicted great bodily injury (Pen. Code, §§ 245, subd. (a)(1), 12022.7). We reverse that part of the order and remand for further consideration of alternative placements.

He also claims, and the Attorney General concedes, that the juvenile court erred in imposing a dangerous weapon enhancement for use of a knife in the commission of the assault. We agree and instruct the court to strike the enhancement on remand.

II. FACTUAL AND PROCEDURAL BACKGROUND

On January 5, 2002, at approximately 2:55 a.m., several Oakland police officers responded to High Street to investigate a stabbing.[1] The victim's grandmother informed the officers that her grandson, Alex E., had been stabbed and was taken to Alta Bates Hospital by his mother.

There was blood on the ground at that address, and the officers observed a trail of blood leading next door where Naomi H., Joshua's aunt, spoke with the officers and allowed them to come into the house. There was blood on the carpet, couch and blankets in the living room. The officers then went to Alta Bates Hospital to locate Alex E.

Alex said he and his friends Joshua H. and Eli H., Joshua's cousin, were hanging out and drinking that night. Joshua called Alex a "bitch," and in response, Alex challenged Joshua to a fight. Joshua grabbed a knife with a four-inch blade and stabbed Alex 7-10 times. Alex suffered stab wounds to his upper left body, upper left arm and left wrist and hand. It was necessary to reattach a tendon in Alex's left forearm and he required physical therapy for his hand.

According to the probation officer's report, Joshua made the following statement: "Me, my cousin Eli and Alex were standing out in front of the house drinking. Alex had been messing with me all day. I got tired of him saying stuff to me so we got into an argument. We started getting loud yelling at each other. It was late so we went inside my cousin's house. Once inside we started arguing again. Alex pushed me against the heater and I took off after him. I picked up my buck knife that was sitting by the fireplace and stabbed him. I know I stabbed him once for sure, but I don't know how many times I stabbed him after that. After I stabbed him, he got up and ran out the door."

Later the same day, January 5, Joshua surrendered himself at the Oakland Police Department. He was taken into custody.

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[1] Because appellant admitted the allegations and no hearing was held, we take the facts primarily from the police report and the probation officer's dispositional report.

On January 8, 2002, the Alameda County District Attorney filed a petition pursuant to Welfare and Institutions Code section 602, [2] alleging that Joshua, then 17 years of age, had committed an assault with a deadly weapon, a knife (Pen. Code, § 245, subd. (a)(1)), and inflicted great bodily injury (Pen. Code, § 12022.7, subd. (a)). The petition also alleged use of a deadly weapon (Pen. Code, §§ 1192.7, subd. (c)(23), 969f).

On January 31, 2002, appellant admitted the allegations. The prosecutor advised the court that the maximum term was seven years. The court, Joshua and his counsel acknowledged the seven-year maximum. In addition, the offense would constitute a "strike" that would have the effect of increasing the penalties for any future felonies. The court then ordered the matter transferred for disposition to San Mateo County where Joshua's uncle resided.

Finding that Joshua was not a resident of San Mateo County because he did not reside with his uncle and because his uncle was not his legal guardian,[3] the San Mateo Juvenile Court transferred the matter back to Alameda County by order filed February 11, 2002.

The Alameda County juvenile court held a dispositional hearing on March 7, 2002. The probation department recommended commitment to CYA based on the nature of the offense and Joshua's ineligibility for placement due to his age.[4] As justification for out-of-home placement, the report reflected that although Joshua was remorseful and had no prior instances of violence,[5] he "present[ed] a threat to the personal safety of others."

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[2] Except as otherwise indicated, all further statutory references are to the Welfare and Institutions Code.

[3] Joshua had been in Oakland for three weeks visiting his aunt prior to being detained. He had planned to return to Sherman Indian High School in Riverside County on March 14, 2002. Before arriving in Oakland, he had resided in Oklahoma with his mother from October 2001 to February 2002.

[4] Joshua turned 18 in March 2002.

[5] Joshua's only history of criminal conduct appears to be a petty larceny charge in June 2001 in Oklahoma for which he was issued a citation and which resolved with a court appearance. In addition, in October 2001, he was expelled from school for

Returning Joshua to his home "would not be in the best interest" due to the serious nature of the offense. In addition, "[t]he minor admits harboring anger and resentment towards his mother because of the abuse she endured during her marriages." The probation department made one referral, to Camp Wilmont Sweeney, but the program director stated that Joshua was not suitable for the program because of his use of a weapon in commission of the offense. The dispositional report indicated that CYA would accept Joshua, that he would have to serve two years before being eligible for parole, that the program would include "school, drug and anger counseling, impact of crime programs," and that CYA would retain jurisdiction over Joshua until the age of 25.

The report also reflected that "[Joshua's mother] and her family would like the minor to come back to Oklahoma on probation, relocate to East Palo Alto with his uncle on probation or be able to attend school with probation supervision in Riverside, California. All of these suggestions are problematic as legal residence is not in San Mateo or Riverside Counties and wardship could not be transferred for supervision. Referral to Oklahoma is equally troublesome due to the nature of the offense, the mother's self-reported domestic environment and the protracted time it would take to process [an] inter-state compact which Oklahoma might reject in any case. The mother understands the possibility of the minor being sent to the California Youth Authority. She believes that [if] Joshua is placed where there is a strong gang presence, he will deteriorate. . . . The only appropriate solution seems to be a commitment to California Youth Authority."

Based on the nature of the offense and the seriousness of the assault, the assistant district attorney asked the court to commit appellant to CYA for the term prescribed by law. He also described the reasons why Joshua had not been charged as an adult, including that Joshua and Alex "were friends, that there had been drinking involved, and

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possession of marijuana. According to Joshua's mother, Joshua's roommate was responsible for the marijuana, but Joshua was deemed "guilty by association." She appealed the expulsion and Joshua was allowed to return. Joshua's mother sent Joshua to visit her sister in Oakland before the new semester started.

that the minor may not have had a record. And even here the mother indicated that the victim, even after the stabbing was somewhat trying to protect the minor who did this to him."

Joshua's attorney agreed that the matter was charged appropriately in juvenile court and stated that Joshua accepted responsibility in the matter and that he and his family "[were not] really objecting to a C.Y.A. placement. They're extremely disappointed that he was not going home, that he, that there is no alternatives [sic] for him due to his age and due to the nature of the crime. I think it's indicative of his character that he understands the consequences of what he did, and he's here fully prepared to accept whatever sentence your honor puts forth at this time." Citing the dispositional report, counsel observed that Joshua did well in school when he was interested and dedicated, and that the assault was an anomaly in his life. Joshua's alcohol problem would have to be addressed, and counsel conceded that because of Joshua's age and the nature of the crime, that might have to be done at CYA. Counsel indicated that Joshua was "very remorseful," that his family was supportive of him, and also that they sympathized with the victim and his family.

Regarding sentencing, the assistant district attorney advised the court that the maximum term was eight years.[6] Joshua's counsel did not disagree with this statement of the maximum term.

At the conclusion of the hearing, the court found that despite his lack of previous delinquent history, because of his age and the seriousness of the offense, as well as "the fact that he poses a serious threat of injury and harm to society, it is this court's belief that this minor could benefit from the reformatory education and discipline and other treatment which would be offered by the California Youth Authority." The court did not believe there was any other option, and that "simply to place [him] on probation and return him to the community would be a mockery of justice in this case given the extent

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[6] Different assistant district attorneys appeared at the hearing in which Joshua admitted the allegations and the dispositional hearing.

of the injuries . . . suffered by the victim." The court opined that Joshua was "very lucky that this was not charged as attempted murder."

The court committed Joshua to the CYA for a maximum term of eight years and found the offense to be within section 707, subdivision (b). The term of confinement was calculated in the order as four years for the assault, plus three years for infliction of great bodily injury, plus one year for use of a deadly weapon. The juvenile court awarded credit of 62 days in custody.

Joshua timely filed this appeal on March 26, 2002.

III. DISCUSSION

A. *The Commitment to CYA*

Joshua contends his CYA commitment was an abuse of discretion because this was his first offense and the juvenile court failed to consider less restrictive placements. According to Joshua, it was unreasonable to sentence him to the extremely punitive environment at CYA because he had no prior record, the assault arose from a drunken argument between friends, and he accepted responsibility and was remorseful for the attack.

As a preliminary matter, we observe that at the dispositional hearing, Joshua raised no objection to the juvenile court's decision to commit him to CYA. Rather, it appears that Joshua expected this disposition. His counsel indicated that Joshua and his family were disappointed that he would not be going home, but acknowledged that due to his age and the nature of the offense, there were no alternatives. Indeed, it could be inferred that Joshua was relieved to find himself in juvenile court and not adult criminal court. Thus, and although neither party has raised the issue, we find that Joshua has waived any error in the juvenile court's sentence by failing to preserve it below.[7] (*People v. Scott* (1994) 9 Cal.4th 331, 356 ["[C]omplaints about the manner in which the trial court

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[7] Joshua briefed the issue of waiver *only* as to the sentence enhancement for use of a deadly weapon. (See section III.B., fn. 10, *post*.) Contrary to his counsel's representation at oral argument, Joshua did not address whether he waived any challenge to the CYA commitment.

exercises its sentencing discretion and articulates its supporting reasons cannot be raised for the first time on appeal."].) "It is settled that failure to object and make an offer of proof at the sentencing hearing concerning alleged errors or omissions in the probation report waives the claim on appeal. [Citations.]" (*People v. Welch* (1993) 5 Cal.4th 228, 234-235; see also *In re Josue S.* (1999) 72 Cal.App.4th 168 [waiver rule is applicable to juvenile court dispositions]; *In re Abdirahman S.* (1997) 58 Cal.App.4th 963, 970 [same].) Joshua and his counsel both had opportunity to address the court regarding sentencing issues at the dispositional hearing, but neither objected to the court's decision or advised the court of any error in the probation report. Had Joshua raised the issue of whether less restrictive placements had been adequately considered, the court could have addressed the issue. Thus, we determine that any error was waived. However, to avoid a future ineffective assistance of counsel claim, we will address the merits of Joshua's claim.

The juvenile court has broad discretion in determining rehabilitation and punishment for the minor, and thus our review of the court's decision is only for abuse of discretion. (§ 202; *In re Asean D.* (1993) 14 Cal.App.4th 467, 473.) An appellate court will not lightly substitute its judgment for that of the juvenile court but rather must indulge all reasonable inferences in favor of the decision and affirm the decision if it is supported by substantial evidence. (*In re Asean D.*, *supra*, 14 Cal.App.4th at p. 473; *In re Michael D.* (1987) 188 Cal.App.3d 1392, 1395.) At disposition, the court properly considers the minor's age, the circumstances and gravity of the offense, and the minor's delinquent history, in addition to other relevant evidence. (§ 725.5.)

To determine whether substantial evidence supports a CYA commitment, we examine the record presented at the dispositional hearing in light of the purposes of juvenile law. (§ 202; *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1395.) Before 1984, California courts held that the purpose of the law was rehabilitation and treatment, not punishment. (See, e.g., *In re Aline D.* (1975) 14 Cal.3d 557, 567.) However, in 1984 the Legislature amended section 202 to emphasize different priorities. (Stats. 1984, ch. 756, §§ 1, 2, pp. 276-277; see also *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1396.)

Section 202 now requires that courts commit delinquent minors "in conformity with the interests of public safety and protection, [to] receive care, treatment and guidance that is consistent with their best interest, that holds them accountable for their behavior, and that is appropriate for their circumstances." (§ 202, subd. (b).) The law now recognizes that "guidance" includes "punishment" which, in turn, includes commitment to CYA both to benefit the minor and to protect society. (Stats. 1984, ch. 756, §§ 1, 2; § 202, subds. (b), (e)(5); *In re Lorenza M*. (1989) 212 Cal.App.3d 49, 57; *In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1396.)

Rehabilitation, however, continues to be an important objective of the juvenile court law. (*In re Teofilio A*. (1989) 210 Cal.App.3d 571, 576.) The rehabilitative purposes of a CYA commitment are demonstrated when there is (1) evidence in the record demonstrating probable benefit to the minor, and (2) evidence supporting a determination that less restrictive alternatives are ineffective or inappropriate. (*In re Teofilio A*., *supra*, 210 Cal.App.3d at p. 576; *In re Michael D*., *supra*, 188 Cal.App.3d at p. 1396.) These considerations must be viewed together with the Legislature's purposes in amending the governing law to place greater emphasis on punishment and societal protection. (*In re Michael D*., *supra*, 188 Cal.App.3d at p. 1396.) Thus, to commit a juvenile to CYA, the lower court must be "fully satisfied that the mental and physical condition and qualifications of the ward are such as to render it probable that he will be benefited by the reformatory educational discipline or other treatment provided by [CYA]." (§ 734.)

Alternative placement options should be considered before committing a minor to CYA because of the danger of incarcerating unsophisticated youths with sophisticated criminals. (See *In re Anthony M.* (1981) 116 Cal.App.3d 491, 503.) "'The statutory scheme . . . contemplates a progressively restrictive and punitive series of disposition orders . . . namely, home placement under supervision, foster home placement, placement in a local treatment facility and, as a last resort, Youth Authority placement.'" (*In re Aline D.*, *supra*, 14 Cal.3d at p. 564.) However, "there is no absolute rule that a Youth Authority commitment should never be ordered unless less restrictive placements have

been attempted." (*In re Ricky H.* (1981) 30 Cal.3d 176, 183; see *In re John H*. (1978) 21 Cal.3d 18, 27.)

The Attorney General argues that the juvenile court may order CYA commitment on a first offense, and that Joshua's age and the violent nature of the offense "eliminated all local alternatives." Joshua concedes that, *in an appropriate case*, the court may commit a minor to CYA without first ordering less restrictive placements.

Courts have upheld CYA commitment, even for first-time offenders, without first attempting a less restrictive placement where the circumstances demonstrate that such alternatives are inappropriate or unavailable. (See, e.g., *In re Ricky H*., *supra*, 30 Cal.3d at p. 183 [minor's escape from juvenile hall by means of force and violence demonstrated that less restrictive placement would have failed]; *In re John H*., *supra*, 21 Cal.3d at p. 27 [lengthy history of gang involvement and several prior violent offenses]; *In re Asean D*., *supra*, 14 Cal.App.4th at p. 473 [vicious attack on two victims during robbery; refusal to take responsibility for the crimes]; *In re Michael D*., *supra*, 188 Cal.App.3d at p. 1396 [brutal and vicious conduct in committing sexual battery; no concern for victim and little remorse]; *In re Samuel B*. (1986) 184 Cal.App.3d 1100 [forcible rape, kidnapping and robbery; minor not in school, instigated the crimes and denied responsibility], overruled on other grounds in *People v. Hernandez* (1988) 46 Cal.3d 194; *In re Jessie L*. (1982) 131 Cal.App.3d 202 [second-degree murder; heavy gang involvement; willing participant in a group that victimized innocent people for purposes of robbery; failure to accept responsibility]; *In re Abdul Y*. (1982) 130 Cal.App.3d 847 [second-degree murder of sister's boyfriend with use of firearm; history of aggressive and violent conduct; parents condoned minor's possession of weapons]; *In re Willy L*. (1976) 56 Cal.App.3d 256, 265 [serious pattern of delinquent activity including burglary and drug offenses].)

In this case, the record discloses that, in making its decision, the court considered the arguments of counsel and statements from several interested parties,[8] in addition to

[8] Alex and his mother both addressed the court regarding Alex's injuries. Alex's mother also pleaded for "justice" for her son, arguing that Joshua should have been

the probation department's dispositional report. The probation department rejected the probation alternatives proposed by Joshua's family as unworkable; the court also rejected them as inappropriately lenient due to the nature of the offense and extent of injuries inflicted on the victim. Joshua does not dispute the conclusions regarding probation.

Regarding placement alternatives, the probation department made, unfortunately, only one attempted referral on Joshua's behalf. Camp Sweeney rejected him because of his use of a knife in the commission of the assault. The only other evidence in the record regarding placement was the placement supervisor's opinion that it would be "extremely difficult" to place Joshua due to his age and the nature of the offense. It appears that, based on this comment and the one unsuccessful referral, the court concluded that no less restrictive alternatives were available--"I don't believe there [are] any other possible options for him."

When a juvenile court's findings are supported by substantial evidence, they must be upheld. (*In re Michael D.*, *supra*, 188 Cal.App.3d at p. 1395.) However, we cannot conclude that Camp Sweeney's rejection and the placement supervisor's opinion that Joshua would be "extremely difficult to place" provided sufficient evidence in support of the court's obligation to ensure that less restrictive placements were adequately explored. (See *In re Tyrone O*. (1989) 209 Cal.App.3d 145, 152; *In re Anthony M.*, *supra*, 116 Cal.App.3d at p. 503.)

In addition, the circumstances of the offense and Joshua's delinquent history--or, rather, his lack of delinquent history--suggest that CYA commitment may not be warranted in this case if there is an appropriate alternative. (§ 725.5; *In re Tyrone O.*, *supra*, 209 Cal.App.3d at p. 152.) The assault apparently was the result of an alcohol-fueled argument between friends rather than a premeditated crime. Joshua had no prior violent history and no gang affiliation. He accepted responsibility for his actions and expressed remorse for the victim and for disappointing his mother. In addition, he

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charged as an adult with attempted murder. Joshua's mother expressed regret for the incident and support for her son.

seemed to be doing well in school in Riverside County, had demonstrated good behavior during his time at juvenile hall, and there is no suggestion in the record of any criminal sophistication.

We do not mean to suggest, however, that on remand the court is precluded from ordering CYA commitment. Joshua was nearly 18 at the time of the assault and the offense was indeed serious. Aggravating factors included the extent of injuries to the victim who was stabbed multiple times, Joshua's admitted problems with marijuana and alcohol, and anger-management issues. CYA commitment would include treatment for substance abuse, addressing a need Joshua contends is evident from the circumstances of the assault. Consequently, upon remand, the court might reasonably conclude that CYA commitment is the most appropriate disposition, provided that other, less restrictive, placements are more thoroughly explored than before.

For the reasons stated, we find that Joshua's counsel's waiver of any claim of error in the sentencing constituted ineffective assistance of counsel. We thus reverse the juvenile court's order committing Joshua to CYA. On remand, we direct the juvenile court to further consider the availability and appropriateness of alternative placements to address Joshua's rehabilitative needs, bearing in mind his time already served at CYA.

B. *The Weapon Enhancement*

Joshua also contends, and the Attorney General agrees, that the juvenile court erred in imposing a one-year sentence enhancement for use of a deadly weapon in the commission of the assault.[9] First, the prosecution did not plead Penal Code section 12022, subdivision (b), which authorizes a sentence enhancement for use of a deadly weapon. Rather, the petition stated that Joshua "personally used a deadly and dangerous weapon, to wit: a KNIFE" and cited Penal Code sections 1192.7, subdivision (c)(23), and 969f, which do not authorize a sentence enhancement.

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[9] Although Joshua did not object in the juvenile court to the one-year sentence enhancement, an unauthorized sentence or a sentence entered in excess of jurisdiction is reviewable whether or not an objection was raised below. (*People v. Smith* (2001) 24 Cal.4th 849, 852; *People v. Dotson* (1997) 16 Cal.4th 547, 554, fn. 6.)

Second, an enhancement for weapon use would have been unauthorized because Joshua's use of a weapon was an element of the aggravated assault pleaded and admitted in this case. (See *People v. McGee* (1993) 15 Cal.App.4th 107, 116 [striking the weapon enhancement in the commission of assault by means of force likely to produce great bodily injury because defendant's use of a knife to stab the victim "was not an additional factor, above and beyond the elements of section 245, subdivision (a)(1) which would permit imposition of a weapon use enhancement"].) We agree that the weapon use enhancement is unauthorized in this case and must be stricken.

IV. DISPOSITION

The case is remanded to the juvenile court for a new dispositional hearing consistent with the views expressed above. The court is also instructed to strike the knife-use weapon enhancement and to reduce the maximum term accordingly.

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Haerle, J.

We concur:

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Kline, P.J.

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Ruvolo, J.